Supreme Court, U.S.
FILED

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(1)

No. 98-

In The
Supreme Court of the United States

October Term, 1998

Damian P. Cleveland,

Petitioner,

v.

Harry K. Singletary,
D.O.C. Secretary;
Robert A. Butterworth,
Attorney General

Respondent(s)

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Damian P. Cleveland 0-182792
Union Correctional Institution
P.O. Box 221 Box W-67
Raiford, Florida 32083

2688

QUESTIONS PRESENTED

I.

WHETHER THE DOCTRINE OF STONE V. POWELL, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), PROPERLY BARS REVIEW OF A FOURTH AMENDMENT CLAIM WHICH INVOLVES A CONFESSION OBTAINED AS FRUIT OF AN ILLEGAL ARREST WHEN PETITIONER IS ENTITLED TO AN INDEPENDENT FEDERAL DETERMINATION AS TO THE VOLUNTARINESS OF HIS CONFESSION?

II.

WHETHER A FEDERAL COURT'S REFUSAL TO REVIEW THE MISAPPLICATION OF STATE STATUTES GOVERNING SENTENCE ENHANCEMENTS VIOLATES DUE PROCESS WHEN THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION EXPRESSLY PROHIBITS A STATE FROM ARBITRARY DEPRIVATIONS OF LIBERTY?

III.

WHETHER THE ELEVENTH CIRCUIT COURT OF APPEALS COMMITTED PLAIN ERROR WHEN HOLDING THAT PETITIONER'S TIMELY FILED OBJECTIONS TO THE MAGISTRATES REPORT AND RECOMMENDATION WERE CONSIDERED BY THE UNITED STATES DISTRICT COURT PRIOR TO THE DISMISSAL OF HIS HABEAS PETITION AND VIOLATING FEDERAL RULES OF CIVIL PROCEDURE, HABEAS CORPUS RULE 8(b)(3) AND (4), AS WELL AS THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

PARTIES

The Petitioner is Damian P. Cleveland, a prisoner in the Florida Department of Corrections prison system.

The Respondents are Harry K. Singletary, Secretary of the Florida Department of Corrections, and Robert A. Butterworth, Attorney General of the State of Florida.

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DECISION BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit is unreported and a copy is attached hereto as Appendix A. (App. 1a-3a). The Order of the United States District Court for the Southern District of Florida is not reported and a copy is attached hereto as Appendix C. (App. 1c-3c).

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on July 9, 1998. An Order denying a petition for Rehearing was entered on September 29, 1998, a copy of that order is attached hereto as Appendix B. (App. 1b-2b). The United States Supreme Court's jurisdiction is invoked pursuant to 28 U.S.C.A. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves Amendments IV, V, and XIV, to the United States Constitution.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without Due Process of law, nor deny to any person within its jurisdiction the Equal Protection of the Laws.

STATEMENT OF CASE

In 1994, the Petitioner, incarcerated in the Florida prison system, filed a pro se habeas petition pursuant to 28 U.S.C. §2254. The U.S. District for the Southern District of Florida addressed only one of three claims on the merits. The two claims not addressed were dismissed on procedural grounds and subsequently appealed, the other abandoned. The claims presented on appeal, which are of the subject matter herein, were presented to the U.S. Court of Appeals as follows:

> (1) WHETHER THE APPELLANT'S FOURTH AMENDMENT RIGHTS WERE VIOLATED WHEN POLICE DELIBERATELY MANUFACTURED PROBABLE CAUSE AND EXIGENT CIRCUMSTANCES IN JUSTIFYING A WARRANTLESS ARREST;
>
> (2) WHETHER THE STATE OF FLORIDA ABUSED ITS DISCRETION WHEN SENTENCING APPELLANT TO AN ENHANCED LIFE SENTENCE WITHOUT PAROLE IN VIOLATION OF HIS 5TH AND 14TH AMENDMENT RIGHTS; AND
>
> (3) WHETHER THE U.S. DISTRICT COURT WHEN FAILING TO CONSIDER APPELLANT'S TIMELY FILED OBJECTIONS TO THE MAGISTRATE'S REPORT AND RECOMMENDATION VIOLATED ARTICLE THREE OF THE 5TH AMENDMENT TO THE U.S. CONSTITUTION.

The Circuit Court of Appeals held in Issue One that Federal Courts are precluded from addressing Fourth Amendment claims that have had a full and fair opportunity for litigation in state

courts, relying on the doctrine of *Stone v. Powell*, 428 U.S. 465, 494-95, 96 S.Ct. 3037, 3052-53, 49 L.Ed.2d 1067 (1967).

When reviewing Issue Two the Circuit Court of Appeal's held that, under our jurisprudence this Court will not review an alleged failure by a State to adhere to its own sentencing guidelines, even when the State law claim is couched in terms of equal protection and due process, citing, *Brannon v. Booth*, 861 F.2d 1507, 1508 (11th Cir.1988).

Finally, as to Issue Three, the Circuit Court held that the district court did consider Cleveland's objections to the Magistrate's report. The Court of Appeals denied, per curiam, a petition for rehearing and or suggestion for rehearing en banc on September 29, 1998, and these proceedings ensued.

ARGUMENT FOR WRIT

Certiorari should be granted as to question one as it involves direct conflict with well established Supreme Court authority, where Petitioner's Fourth Amendment claim challenges the legality of a coerced confession obtained as fruit of an illegal arrest (App. 1a-3a), and therefore, he is plainly entitled to de novo federal review of his claim to determine the issue of voluntariness of his confession. *Miller v. Fenton*, 474 U.S. 104, 110, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985); and *Withrow v. Williams*, 507 U.S. 680, 113 S.Ct. 1745, 1754, 123 L.Ed.2d 407 (1993).

To that end, the *Stone* preclusionary rule does not apply and violates Petitioner's due process rights guaranteed under the Fourteenth Amendment where he has been denied his clear legal right to an independant federal determination as to the issue of voluntariness, regardless of any state court determination.

Moreover, *Stone* does not bar Petitioner's claim when he was not afforded a full and fair opportunity to litigate his claim in state court. Petitioner has pointed out numerous material factual disputes regarding the issues of probable cause and exigent circumstances, which have gone unresolved throughout Petitioner's appellate plight.

The material controversies in the record involve conflicts in law enforcement testimony and present a prima facie showing that Petitioner's warrantless arrest and illegal seizure

proceeded on less than probable cause, and that Police lied to deliberately create exigent circumstances which were, admittedly, not present at the time of arrest. These material controversies have not been adjudicated by any court, State or Federal.

Whereas, the Petitioner's Fourth Amendment claim becomes a matter of great public importance, not only because the failure to reach the merits of a claim which challenges the validity of his coerced confession effects the integrity of the judicial process, but also because law enforcement officers who are not held within the confines of the constitution, pose a very real concern for all citizens.

In which case, the Eleventh Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings by sanctioning the lower district courts refusal to determine the issue of voluntariness of Petitioner's confession, de novo, as to call for an exercise of this Court's supervisory power.

Likewise, Certiorari should be granted as to question two, where the Fifth and Fourteenth Amendments guarantee that no state shall arbitrarily deprive a person of liberty. The Eleventh Circuit Court of Appeals has refused to enforce Petitioner's rights, resulting in an inter-circuit conflict as well as a decision contrary to the mandates of this Honorable Court.

Petitioner's claim alleges that the trial judge was acting beyond statutory

discretion when sentencing him to an enhanced life sentence without parole based upon factors which are expressly prohibited by the Florida Legislature as valid departure considerations; thus, creating a liberty interest.

The Court of Appeals failed to recognize that federal courts have the power to correct state process and a liberty interest may arise from the Constitution or from laws of states. *Hewitt v. Helms*, 459 U.S. 460, 103 S.Ct. 864, 868, 74 L.Ed.2d 675 (1983). Furthermore, when a state's failure to adhere to its own law violates a federal right, such as Petitioner's liberty interest, then the application of state law is cognizable in habeas proceedings. *Hicks v. Oklahoma*, 447 U.S. 343, 100 S.Ct. 2227, 65 L.Ed.2d 175 (1980). In *Hicks*, this Court held that State laws guaranteeing a defendant procedural rights at sentencing may create liberty interests protected against arbitrary deprivation by the due process clause of the Fourteenth Amendment. See also, *Jones v. Arkansas*, 929 F.2d 375, 377 (8th Cir.1991). Cf., *U.S. v. Moore*, 43 F.3d 568, 571 n.2 (11th Cir.1995) (wherein the 5th Amendment protection against cumulative punishment serves two purposes; it ensures that sentencing discretion of courts is confined to the limits established by the legislature to proscribe crimes and punishments.)

In *Walker v. Deeds*, 50 F.3d 670 n.7 (9th Cir.1995), the Ninth Circuit Court of Appeals held:

> "when a state has provided a specific method for determining whether a certain sentence shall be imposed, "it is not correct to say that the defendant's interest in having that method adhered to is merely a matter of state procedural laws." citing, Fetterly v. Paskett, 997 F.2d 1295, 1300 (9th Cir.1993).

And see, Ballard v. Estelle, 937 F.2d 453, 456 n.4.5 (9th Cir.1991), (wherein Court of Appeals reaches due process challenges to length of sentence on grounds that trial court misapplied state statutes governing sentence enhancements.)

In Petitioner's initial pro se habeas petition his sentencing claim was simply stated in terms of state procedural law, though he presented sufficient facts which gave rise to the cause of action, to wit: that his 5th and 14th Amendment rights were violated. The Petitioner had stated that the trial court erroneously applied state statutes when enhancing his sentence on the basis of injuries to the victim, as victim injury is a factor fully taken into account by the guidelines. Such would naturally imply a double jeopardy violation as multiple punishment for the same offense, where the Florida Legislature prohibits enhancement based upon a factor already considered in determining a presumptively apporpriate guideline sentence. In addition, Petitioner stated that the trial court erred when expressly relying upon factors which are inherent components of the crime in question, as said reasoning is strickly prohibited by statute and can never be used to justify departure from the

guidelines.

On appeal, he specifically pointed out that although his habeas claim was phrased to suggest primarily state errors, a pro se petition, nonetheless, is to be construed to raise federal claims, pursuant to *Jones v. Jerrison*, 20 F.3d 849, 859 n.3,4 (8th Cir.1994); and *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977) (wherein a pro se petition is to be liberally construed and need only to set forth facts giving rise to the cause of action).

Therefore, Petitioner's claim involves both, conflict in decisions, as well as a matter of great public importance where per curiam summary affirmances are so systematically applied by state appellate courts that the federal judiciary becomes the first real and last review for challenges to sentences on constitutional grounds, and when they too, turn a deaf ear, the American public has no assurance of recieving due process under our adversarial system of criminal justice. Certainly, the founders of the U.S. Constitution intended that no state arbitrarily deprive a citizen of liberty without due process of law. So then, the federal courts must reach and decide sentencing claims which involve a trial judges misapplication of state statutes pertaining to guideline sentencing enhancements.

In regards to question three, Certorari should be granted because Petitioner's Objections to the Magistrate's Report and Recommendation were not taken into consideration before

the U.S. District Court issued its order dismissing his habeas petition, as required under Federal Rules of Civil Procedure, Habeas Corpus Rule 8(b)(3) and (4).

The Court of Appeals somehow overlooked the fact that there were no docket entries for the month of September, 1995, despite Petitioner's deadline to file objections had been September 12, 1995. In fact, there were no objections entered on the docket at any point prior to the district court's January 30, 1996, Order, dismissing without relief. (App. 1c-2c) Not only does the Order itself reveal that Petitioner's objections were not before the Court when adopting the Magistrate's Report and Recommendation, but the Respondent also acknowledged, in their appellate reply brief, that the objections were never considered.

It is directly evident then, that the Petitioner's timely filed objections were not considered, although he has provided a U.S. Mail, Return Receipt, signed by the Clerk of the U.S. District Court on September 12, 1995, verifying timely reciept. Moreover, the respondent confirmed reciept of a courtesy copy of said objections on September 11, 1995.

Furthermore, even though Petitioner attached a second copy of his objections to the Motion for rehearing which was filed nearly six months after the January 30, 1996, Order, the objections could not have been considered since they would have been out of time at that point.

Under these circumstances, it becomes a matter of great public importance when all documentary evidence plainly establishes a clerical error in properly filing said document, yet, the Court of Appeals commits plain error by holding that the objections were considered. Thus, the Court of Appeals, again, has so far departed from the accepted and usual course of judicial proceedings by sanctioning the lower district court's denial of Petitioner's initial habeas petition without first conducting a mandatory de novo review of his timely filed objections.

CONCLUSION

WHEREFORE, in light of the foregoing argument and citations of authority, it is respectfully presented that the decision of the Eleventh Circuit Court of Appeal is in direct and express conflict with the opinion of this Honorable Court and the decisions of other Circuit Courts of Appeals previously rendered on the same questions of law. In having two disparate opinions, both cannot be correct, and this Petition seeking Certiorari for further clarification, of the instant matter, is properly before this Court, warranting its supervisory powers.

Respectfully submitted,

Damian P. Cleveland 0-182792
Union Correctional Institution
P.O. Box 221 Box W-67
Raiford, Florida 32083

I HEREBY DECLARE, under the penalty of perjury that I have read the foregoing Petition for Writ of Certiorari, and the facts and matters stated therein are true pursuant to 28 U.S.C. § 1746.

Executed this 1st day of April, 1999.

Respectfully submitted,

Damian P. Cleveland 0-182792
Union Correctional Institution
P.O. Box 221 Box W-67
Raiford, Florida 32083

APPENDIX

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-4236
Non-Argument Calendar

D.C. Docket No. 94-6458-CV-NCR

DAMIAN CLEVELAND,

Petitioner-Appellant,

versus

HARRY K. SINGLETARY, Secretary,
Department of Corrections,
ROBERT A. BUTTERWORTH,
Attorney General, et al.,

Respondents-appellees.

Appeal from the United States District
Court for the Southern District of Florida

(July 9, 1998)

BEFORE HATCHETT, Chief Circuit Judge,
BARKETT, and MARCUS, Circuit Judges.

PER CURIAM:

Damian Cleveland appeals the denial of his pro se 28 U.S.C. § 2254 habeas corpus petition.

On appeal, Cleveland argues that (1) his Fourth Amendment rights were violated when physical evidence and a confession tainted by an illegal arrest were admitted; (2) his Fifth Amendment rights were violated when he was questioned without being told his Miranda rights; (3) he received ineffective assistance of counsel when his attorney failed to object to misleading jury instructions; (4) when the sentencing court improperly departed from the state sentencing guidelines it violated his equal protection and due process rights and the Double Jeopardy Clause; and, finally, (5) the district court erred when it did not consider his timely filed objections to the magistrate's report before denying his petition for reconsideration.

Federal habeas courts are precluded from addressing Fourth Amendment claims that have had a full and fair opportunity for litigation in the state courts. Stone v. Powell, 428 U.S. 465, 494-95, 96 S.Ct. 3037, 3052-53, 49 L.Ed.2d 1067 (1976). This Court will not address claims made for the first time on appeal. Walker v. Jones, 10 F.3d 1569, 1572 (11th Cir.1994). Nor under our jurisprudence will this Court review an alleged failure by a state to adhere to its own sentencing guidelines, even when this state law claim is couched in constitutional terms of equal protection and due process. Brennon v. Booth, 861 F.2d 1507, 1508 (11th Cir.1988).

We have reviewed the pleadings, the state court record, and all other relevant portions of the record. Having considered those together with the briefs of the parties, we find no reversible error. Cleveland had a full and fair opportunity

to litigate his Fourth Amendment claims in state court, and thus, federal review of those claims is barred. Cleveland did not argue ineffective assistance of counsel, violation of his Miranda rights, or a sentence in violation of the Double Jeopardy Clause in the district court, and thus, those claims will not be considered on appeal. A state's failure to follow its own sentencing guidelines is a matter of state law, and accordingly, such a claim is not cognizable in a federal habeas corpus petition. Finally, the district court did consider Cleveland's objections to the magistrate's report

AFFIRMED.

Filed July 9, 1998
U.S. Court of Appeals
Eleventh Circuit

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-4236

DAMIAN CLEVELAND,

Petitioner-Appellant,

versus

HARRY K. SINGLETARY, Secretary,
Department of Corrections,

ROBERT A. BUTTERWOTRH. Attorney General,

WILLIE FORD, Superintendent,

Respondents-Appellees.

On Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC
(Opinion __,11th Cir.,19__, __ F.2d __).

BEFORE: HATCHETT, Chief Judge, BARKETT and MARCUS, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ Stanley Marcus
United States Circuit Judge

ORD-42
Filed September 29, 1998 (6/95)

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTICT OF FLORIDA

DAMIAN CLEVELAND,

Petitioner,

vs. Case No: 94-6458-CIV-ROETTGER

HARRY K. SINGLETARY,

Respondent
_____/

ORDER

THIS CAUSE is before the Court on Petitioner's petition for a writ of habeas corpus. On January 23, 1995 Magistrate Judge Charlene H. Sorrentino recommended that this petition for writ of habeas corpus be denied. Petitioner failed to respond to magistrate Sorrentino's report and recommendation and on February 14, 1995 this Court ordered that this petition for writ of habeas corpus be denied.

On May 17, 1995 Petitioner moved, in part, for reconsideration of the Court's denial of this petition, citing as grounds that Petitioner was committed to a psychiatric ward at the South Florida Reception Center which rendered him unable to respond to the Magistrate's report and recommendation. Based upon these assertions by Petitioner, on August 25, 1995 the Court granted Petitioner's Motion for Reconsideration and granted Petitioner ten days from the date of that order to respond to the Magistrate's report and recommendation.

Since the Court's last order Petitioner has filed a Motion to Clarify the Record (DE# 26) which, upon review, is not a motion to clarify the record at all but rather a request that the clerk forward the record to the Eleventh Circuit Court of Appeals for appellate review. Petitioner has also filed a Motion for Extension of Time to File Supplement to Objection to Magistrate's Report (DE# 27) and Motion for Permission to Appear by Herbert P. Sterling, Esq. (DE# 28). Because Petitioner has been given far greater opportunity to argue and submit pleadings in favor of his petition for habeas corpus than the majority of other habeas corpus petitioners, it is

ORDERED AND ADJUDGED that Petitioner's Motion for Extension of Time (DE# 27) is hereby **DENIED**. It is also

ORDERED AND ADJUDGED that Petitioner's Motion to Clarify Record (DE# 26) is hereby **DENIED**. It is also

ORDERED AND ADJUDGED that Petitioner's Motion for Permission to Appear by Herbert P. Sterling, Esq. (DE# 28) is hereby **GRANTED** to the extent that proceedings will continue in this cause, that is, counsel may appear for the limited purpose of petitioner's appeal. It is also

ORDERED AND ADJUDGED that upon review of the report and recommendation prepared by United States Magistrate Judge Charlene Sorrentino, and upon independent de novo review of the entire record herein, the findings and recommendation of Magistrate Judge Sorrention are approved and adopted. Accordingly, it is

ORDERED AND ADJUDGED that this petition for writ of habeas corpus is denied. The clerk is directed to close

this case. All remaining motions are denied as moot.

DONE AND ORDERED this 27 day of January, 1996.

s/ Norman C. Roettger
Norman C. Roettger
Chief United States District Judge

cc: counsel of record

filed January 30, 1996